

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

OTTO R. MEDINA,

Petitioner,

CASE NO. 2:06-cv-921

JUDGE HOLSCHUH

MAGISTRATE JUDGE KEMP

v.

JEFFREY WOLFE, Warden,

Respondent.

OPINION AND ORDER

On August 8, 2007, the Magistrate Judge issued a *Report and Recommendation* recommending that the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 be dismissed. Petitioner has filed objections to the Magistrate Judge's recommendations. For the reasons that follow, petitioner's objections are **OVERRULED**. The *Report and Recommendation* is **ADOPTED** and **AFFIRMED**. This action hereby is **DISMISSED**.

Petitioner objects to the Magistrate Judge's dismissal of his claim of insufficiency of evidence on the merits. He again argues that his conviction was against the manifest weight of the evidence, and that, because the evidence against him was circumstantial, it must have been inconsistent with any reasonable hypothesis of guilt. These arguments are not persuasive. As discussed by the Magistrate Judge, circumstantial evidence alone is sufficient to sustain a conviction "and such evidence need not remove every reasonable hypothesis except that of guilt." *United States v. Blackwell*, 459 F.3d 739, 760 (6th Cir. 2006)(citations omitted.) For the reasons discussed by the Magistrate Judge, petitioner's claim that his conviction was against the manifest weight of the evidence is not one of constitutional magnitude that may be considered by this Court. Further, after review of the entire record, this Court agrees with the conclusion of the state appellate

court that, when viewing all of the evidence in the light most favorable to the prosecution, *see Jackson v. Virginia*, 443 U.S. 307, 319 (1979), the evidence was constitutionally sufficient to sustain petitioner's conviction on felonious assault with a firearm specification.

Petitioner also objects to the Magistrate Judge's conclusion that claim two was procedurally defaulted. Petitioner contends that the claim was properly raised on direct appeal; however, as discussed by the state appellate court when it rejected his ineffective assistance of counsel claim, his allegation that trial counsel failed to present defense witnesses could not be properly addressed on direct appeal since the claim was not readily apparent from the face of the record. *See* Exhibit 14 to Return of Writ.

Petitioner does not object to dismissal of claim three, which he requested to withdraw.

Pursuant to 28 U.S.C. 636(b)(1), this Court has conducted a *de novo* review of the *Report and Recommendation* objected to. The Court has carefully considered the entire record as well as all of the arguments raised by petitioner. For the foregoing reasons and for the reasons detailed in the Magistrate Judge's *Report and Recommendation*, petitioner's objections are **OVERRULED**. The *Report and Recommendation* is **ADOPTED** and **AFFIRMED**. This action hereby is **DISMISSED**.

IT IS SO ORDERED.

Date: October 3, 2007

/s/ John D. Holschuh
JOHN D. HOLSCHUH
United States District Judge